Filed 1/4/13 P. v. Poizner CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANDREW POIZNER, Defendant and Appellant.	D059561 (Super. Ct. No. SCD226027)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed.

A jury convicted Robert Andrew Poizner of committing lewd and lascivious acts with a child (Pen. Code, § 288, subd. (a), counts 1-6, involving victim Austin G. and counts 22-23, involving victim Evan W.); committing lewd acts upon a 14 to 15-year-old child (Pen. Code, § 288, subd. (c)(1), counts 12 & 14, involving Brandon P.); exhibiting harmful matter to a minor (Pen. Code, § 288.2, subd. (a), counts 7, 8 & 15); distributing or exhibiting harmful matter to a child (Pen. Code, § 313.1, subd. (a), counts 16, 19 & 27); contributing to the delinquency of a minor (Pen. Code, § 272, subd. (a)(1), counts

17, 20, & 21); dissuading a witness (Pen. Code, § 136.1, subd. (b)(1), counts 18 & 25); and disobeying a court order (Pen. Code, § 166, subd. (a)(4), counts 26 & 28). The jury acquitted Poizner of two counts of lewd and lascivious acts with a minor as to Brandon P. (counts 9 & 10) and found him guilty of the lesser included offense of sexual battery (Pen. Code, § 242; counts 11 & 13). As to counts 1-6, 22 and 23, the jury found true allegations that Poizner committed his crimes on multiple victims. As to counts 2, 5 and 22, it found true allegations that Poizner engaged in substantial sexual conduct with a child under the age of 14, and as to counts 2 and 5, that he used obscene matter. (Pen. Code, § 1203.066, subds. (a)(8) & (9).) It found true allegations that Poizner committed the dissuasion offenses of counts 18 and 25 while on bail. (Pen. Code, § 12022.1, subd. (b).) The trial court sentenced Poizner to an indeterminate term of 75 years to life plus a consecutive determinate term of seven years.[1]

On appeal, Poizner contends the trial evidence did not establish the corpus delicti of certain uncharged criminal acts reflected in journal writings that were introduced into evidence on the issue of his propensity and the court prejudicially erred by failing to give

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1 Poizner's sentence consists of five consecutive 15-year-to-life terms under the One Strike Law for counts 1, 4, 5, 22 and 23; concurrent 15-year-to-life terms on counts 2, 3 and 6; the upper term of three years plus two years for the on-bail enhancement on count 18 as the principal count; consecutive eight-month terms (one-third the midterm) on counts 12, 14 and 25; a two-year consecutive term for the on-bail enhancement on count 18; and concurrent three-year upper terms on counts 7, 8, and 15. It sentenced Poizner to 346 days local custody for the consecutive sentences on misdemeanor counts 19, 27 and 28, for which Poizner had credit for time served, and imposed concurrent terms on misdemeanor counts 16, 17, 20, and 21. It stayed the term on misdemeanor count 26 under Penal Code section 654. Counts 11 and 13 were inadvertently omitted during the reading of the verdict, and as a result the trial court dismissed them.

sua sponte a proper corpus delicti instruction as to those uncharged criminal acts. He also contends the court prejudicially erred by (1) admitting into evidence portions of his journal writings under Evidence Code[2] section 1108 because the actions described in the writings did not qualify as a sexual offense under that statute; (2) instructing the jury to consider charged offenses as propensity evidence under section 1108; and (3) allowing the People to admit evidence of his sexual orientation as well as the cover of a pornographic DVD on the issue of his intent and instructing the jury that the evidence was relevant on that issue, or, alternatively, failing to exclude that evidence under section 352. Poizner maintains the cumulative impact of these errors requires reversal.

We decline to apply the corpus delicti rule to the section 1108 uncharged crimes evidence, and reject Poizner's remaining contentions. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, Poizner was a volunteer counselor at Pacific Health Systems, a substance abuse rehabilitation center. There, he introduced himself to and befriended adolescent boys who were attending Alcoholics Anonymous (AA) and other group meetings, telling one of the boys he was there to help keep himself sober and assist other teenage boys. He then brought the boys to his apartment where he committed acts summarized below and for which he was convicted of the above-referenced offenses. At trial, each victim testified about Poizner's conduct and touching, and the circumstances that otherwise led

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[2] All further statutory references are to the Evidence Code unless otherwise indicated.

to the charges against him. Like Poizner's opening brief, our factual summary focuses mainly on the evidence supporting the felony sexual assault offenses against Austin G., Brandon P., Evan W., and Andrew D.

Counts 1-8: Austin G.

In September 2009, Poizner agreed to become the AA sponsor of then 13-year-old Austin G. One night after an AA meeting, Poizner obtained Austin's parents' permission to take Austin out for coffee. Afterwards, Poizner took Austin back to his apartment, where he put on an adult pornographic movie for Austin to watch and gave him cigarettes. Poizner sat on a couch next to Austin and at some point began to touch Austin's genitals over his clothing, then underneath his clothing. Poizner offered to orally copulate Austin but then resisted, telling Austin it would be "awkward" since he was Austin's sponsor. Poizner asked Austin to show him his penis, and Austin did so by unbuttoning his pants. Poizner also kissed Austin on his buttocks. Austin and Poizner eventually left the apartment in Poizner's car, where Poizner again rubbed Austin's genitals over his clothing. When Poizner returned Austin home, he told Austin's mother he was gay, but that he was into stable, committed relationships and not interested in teenagers or boys. Austin did not tell his mother what had happened because he was in shock and did not want anyone to know about it.

Three days later, Austin's mother dropped Austin off to meet Poizner at a comedy club. About an hour and a half later, they went back to Poizner's apartment, where Poizner again put on pornography, pulled down Austin's pants and began rubbing Austin's genitals. Poizner also rubbed himself over his clothing, and then asked whether

Austin wanted to be orally copulated. Again, Poizner refrained, acknowledging his role as Austin's sponsor. Austin pulled up his pants, they smoked cigarettes, and Poizner took him home. On the way, Poizner told Austin not to tell anyone about what had happened.

At trial, the People played for the jury a tape-recorded pretext call between Austin and Poizner, in which Austin talked about what had happened. Poizner asked Austin if he was angry at him, and told him "that shit's never happened again." Austin asked Poizner to not touch him on his genitals if they ever went out again, and Poizner responded with incriminating statements, saying it would "never again" happen and his touching Austin "was just like something that just kind of happened . . . ."

Counts 11-18: Brandon P.

In May 2009, Poizner became Brandon P.'s sponsor at Pacific Health Systems. Brandon P. was 13 years old at the time. Brandon began going to Poizner's apartment where he would spend the night on Poizner's mattress on the floor, sometimes with other friends, including Austin. Poizner usually slept on the mattress or on a couch in his bedroom. He would buy Brandon cigarettes, and also let him watch adult heterosexual pornographic videos.

Sometimes before or after showing the videos, Poizner would massage Brandon's back or feet, and sometimes the feet of the other boys. Sometimes he would hug Brandon and kiss him on the neck, usually when Brandon was leaving. On about 10 or 15 occasions in late 2009, Poizner spanked Brandon, sometimes pulling down his pants and exposing his buttocks and lightly spanking him, and sometimes having Brandon bend over his knee. Poizner also spoke about his sex life with Brandon while they were alone,

telling Brandon about other men he had sex with, and describing oral sex. Poizner once jokingly offered to enter the shower while Brandon was showering. Brandon saw that Poizner touched himself in his groin area while the pornography was playing. On two different occasions, Poizner tapped Brandon's penis with the back of his hand, once over Brandon's clothes and another time after quickly pulling down Brandon's boxers. Brandon testified that while he was still 13 years old, Poizner had massaged his back and neck about five times, and had hugged and kissed him a couple of times.

When the allegations of Poizner's molestations began to surface, Poizner called Brandon and told him to avoid speaking with an investigating detective. Poizner picked Brandon up at school that day to prevent him from seeing the detective.

Count 19: Andrew D.

Andrew D. was a school friend of Brandon's, and got to know Poizner through Brandon. He went to Poizner's house with Brandon and another friend, Colten. They rented a regular movie and at some point, Poizner massaged Andrew's feet. Andrew fell asleep in Poizner's bed wearing his shirt and boxer shorts. Colten slept in the same bed. When Andrew awoke, an adult heterosexual pornographic movie was playing on the television, and Poizner, Andrew and Colten watched it for about a half an hour.

Counts 20-23: Evan W.

Evan W., who was twelve years old at the time of trial, was another school friend of Brandon's and met Poizner through Brandon. One night, Evan called Poizner, who picked him up in Encinitas and took him downtown where they ate and walked around, and eventually ended up at Poizner's apartment. Evan and Poizner watched a movie, and

Evan consumed most of an alcoholic drink that Poizner had purchased for him. Evan was lying on Poizner's bed over the covers but got sick and passed out, awaking to find himself under the covers with adult heterosexual pornography on the television.

Evan estimated he spent the night at Poizner's apartment about 10 times. Poizner always gave Evan cigarettes. Evan, along with his friend Stephen, spent a third night at Poizner's apartment after Christmas of 2009, and drank another alcoholic beverage. On this occasion, Poizner used a belt to spank both Stephen and Evan on their bare buttocks multiple times, joking that it was to punish them for going out and needing a ride. Evan laughed, though Evan did not want Poizner to spank him.

On the fourth night Evan spent at Poizner's apartment, Poizner massaged Evan's back underneath his shirt, and eventually slipped his hands into Evan's pants and massaged his penis. Evan also recalled spending the night at a hotel with Poizner and other boys on more than one occasion. Poizner would give the boys foot massages and once kissed Evan's foot.

Poizner told Evan not to tell anyone about coming to his apartment and drinking or the fact Poizner had touched him. He told Evan not to speak about his arrest and that Evan did not have to answer questions from the police.

Testimony of Brandon P.'s Friends

Colten A., Deon D., Erick N., Tyler M., and Gabriel G. were Brandon's friends who all at some point visited Poizner's apartment. On one occasion there, Colten A. fell asleep and awoke to find a pornographic video playing and Poizner, who was only a few

inches away from him, looking at him and Brandon. He became concerned when he noticed most of his fly was unbuttoned though it had been closed when he fell asleep.

While at Poizner's apartment, Deon D. saw Poizner give Gabriel G. a kiss. Deon also observed that Poizner was always talking about sex, gave Brandon a back massage on one occasion, and once bet him and other friends that Brandon had a bigger penis than them.

Erick N. smoked hookah and cigarettes given to him by Poizner at Poizner's apartment. Poizner once massaged Erick's feet at a hotel and on one occasion kissed him on the neck. Poizner asked Erick about masturbation and talked about girls giving Erick oral sex while touching Erick on his thigh near his groin, making Erick feel uncomfortable.

Poizner offered Gabriel G. cigarettes and offered to show him and others pornographic videos. When allegations against Poizner surfaced, he called Gabriel and discouraged him from telling anyone he had gone to Poizner's apartment, and told him to come up with a "really good alibi." According to Gabriel, Poizner claimed Brandon's father was trying to make false accusations. He also discouraged Gabriel from saying anything to police.

Testimony of James A.

In November of 2005, James A., who had turned 18 years old the month before, was stationed in the military in San Diego, and met Poizner when Poizner offered to give him a ride back to his base. They exchanged numbers and James A. called Poizner to meet and "hang out." Eventually, they ended up at Poizner's house where James A. drank

alcohol and they watched movies. After the first visit, James A. spent several nights at Poizner's house drinking and watching pornographic movies. James A. slept on the couch in the living room and Poizner slept in his bedroom. On one occasion, Poizner gave James A. a back massage. On another occasion while they were watching pornography, Poizner, who had told James A. he was bisexual, gave James A. a "weird look," causing James A. to feel awkward. James A. asked to be taken back to his ship because he did not know what Poizner was planning on doing.

Evidence of Poizner's Journal Entries

Before trial, the court considered the People's motion to admit a number of writings found in Poizner's home, including journal entries Poizner admitted writing describing his actions on different occasions with respect to two individuals identified as "James" and "Homeboy." The trial court heard extensive argument concerning the writings and excluded some as reflecting dissimilar conduct that was highly prejudicial. However, expressly conducting a section 352 analysis and inferring that the entry about "James" referred to James A., the court concluded that the two journal entries regarding James and Homeboy reflected recent conduct—including fondling, spanking, and showing the subjects pornography at Poizner's house—that was sufficiently similar to the charged misconduct to give them a high degree of relevance on the issues of Poizner's propensity and intent, as well as corroborating the victims' testimony.

At trial, the journal entries were read into evidence by a prosecution investigator. The entry concerning "James" began, "Dear James," then Poizner wrote that he had fondled James while he was sleeping, he had apologized to James about it but lied about

why he did it, he was working through his " 'sexual acting out through S.C.A. and the 10th Step,' " and offered to "make things right." The reverse side of the writing stated: " '10th Step. Last night I fondled this guy James while he was sleeping on my couch. He had nowhere else to go. I decided to do it. Not . . . it would affect him or not [*sic*]. He woke up startled.' " In the Homeboy entry, Poizner described various sexual acts he and Homeboy had engaged in, including oral copulation, masturbation and spanking, at times while watching pornography. Poizner wrote that he was Homeboy's AA sponsor when Homeboy was 17 years old, and that he had to personally observe Homeboy's drug testing, which necessitated watching him urinate. Poizner described fantasizing about Homeboy's penis and orally copulating him. Poizner also described how, on the night of Homeboy's 18th birthday, he came to Poizner's house where Poizner massaged him over his genital area and on his buttocks, and with his consent, spanked him on his bare buttocks " 'for his birthday. . . .' " Poizner wrote that he recalled " 'possibly smacking [Homeboy's] ass a couple of times before, jokingly, before he was 18, I think once.' "

Jury Instructions as to Journal Entries, Corpus Delicti, Prior Crimes and Other Acts and Admissions

The trial court instructed the jury with regard to Poizner's writings and on corpus delicti, as follows: "You have heard evidence that the defendant made oral and written statements before the trial. You must decide whether the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements. Consider with

caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded. [¶] The defendant may not be convicted of any crime based on his out-of-court statements alone. This is the corpus delicti rule. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statements alone."

The trial court also instructed the jury regarding the People's evidence of other charged and uncharged sex offenses, and gave a limiting instruction as to Poizner's consensual sexual conduct and sexual preference. As read to the jury, the instructions, consisting in part of a modified version of CALCRIM No. 1191, provided:

"The People presented evidence in this case that the defendant committed sexual offenses not charged in this case. This refers to the defendant's writings: 'Dear James,' specifically unzipping the victim's pants and fondling him while he was asleep, and 'Homeboy,' specifically spanking on the bare buttocks, if determined to be accomplished for the purpose of deriving sexual pleasure from the infliction of physical pain.

"In addition, sexual offense crimes against three alleged victims are charged in this case. These are Counts 1 through 6, which relate to Austin G.; 9 through 14, which related to Brandon B.; and 22 and 23, relating to Evan W. These crimes are defined for you in these instructions.

"In evaluating whether the defendant is guilty or not guilty of each charged sex offense . . . you may consider this evidence, the above-described charged and uncharged offenses, only if the People have proved beyond a reasonable doubt that the defendant in fact committed any or all of those offenses. If the People have not met this burden of proof as to any of these offenses, you must disregard the evidence relating to that offense entirely in your consideration of any other charged crime.

"If you decide that a sexual offense charged or uncharged, was committed, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit the charged sex offenses here.

"If you conclude that the defendant committed any or all of the charged or uncharged sexual offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of each count. The People must still prove each element of each charged offense beyond a reasonable doubt.

"Proof beyond a reasonable doubt has already been defined for you.

"You may also consider this evidence for the purpose of: deciding whether or not the defendant acted with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child as alleged in Counts 1 through 6, 9 through 14, 22 and 23—those are the sexual offenses and the specific intent required; for deciding whether or not the defendant had a plan or scheme to commit the above counts; and in evaluating the credibility of witnesses.

"The People also presented evidence that: the defendant engaged in other sexual conduct, specifically consensual sexual activity with another male, 'Homeboy,' after the age of 18; they presented evidence that the defendant was in possession of pornographic videos; and evidence that the defendant has admitted being homosexual and/or bisexual and was in possession of a homosexual DVD case.

"You must not consider this evidence in determining where [*sic*] the defendant was disposed or inclined to commit sexual offenses. You may consider this evidence solely for the limited purpose of: deciding whether or not the defendant acted with the specific intent required for the sex crimes; deciding whether or not the defendant had a plan or scheme to commit the sex crimes; and evaluating the credibility of witnesses."

DISCUSSION

I. *Claim of Corpus Delicti Violation*

Poizner contends the admission of the uncharged acts reflected in the writings concerning James and Homeboy violated the corpus delicti rule and his right to due process because there was no corresponding evidence of these acts independent of his writings, and the jury was not instructed to determine whether those acts were supported by any quantum of independent evidence. He argues that absent proof of the corpus delicti, the uncharged crimes were irrelevant, not properly presented to the jury, and could not be considered as propensity evidence.[3]

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[3] We observe that Poizner did not assert an objection based on the corpus delicti rule. However, claims based on insufficiency of the evidence or instructional error with respect to the corpus delicti rule have been entertained on appeal in the absence of an

A. *Legal Principles*

"The purpose of the corpus delicti rule is to satisfy the policy of the law that 'one will not be falsely convicted, by his or her untested words alone, of a crime that never happened.' " (*People v. Miranda* (2008) 161 Cal.App.4th 98, 107; see also *People v. Alvarez, supra*, 27 Cal.4th at p. 1169.) The rule requires the prosecution to "prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant." (*Alvarez*, at pp. 1168-1169.) However, " '[t]he amount of independent proof of a crime required for this purpose is quite small [and has been] described . . . as "slight" [citation] or "minimal." ' " (*People v. Herrera* (2006) 136 Cal.App.4th 1191, 1200, quoting *People v. Jones* (1998) 17 Cal.4th 279, 301.) Such proof may be circumstantial and need not be beyond a reasonable doubt; it is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. (*Alvarez*, 27 Cal.4th at p. 1171.) "[O]nce the necessarily quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues." (*Ibid*.)

B. *Analysis*

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objection in the trial court. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1170, 1178; but see *People v. Horning* (2004) 34 Cal.4th 871, 899 [absent a corpus delicti objection at trial, which would have given the prosecution the opportunity to argue the matter, the objection may not be raised on appeal; holding in any event that the corpus of the robbery at issue was established].)

As Poizner acknowledges, the California Supreme Court has not squarely decided whether the corpus delicti rule applies to evidence admissible under sections 1101, subdivision (b) or 1108. (See *People v. Clark* (1992) 3 Cal.4th 41, 124 [addressing evidence admitted under section 1101, subdivision (b): "It is not clear that the corpus delicti rule applies to other crimes evidence offered solely to prove facts such as motive, opportunity, intent, or identity, or for impeachment"; declining to decide the issue because the corpus was independently established]; see also *People v. Horning*, *supra*, 34 Cal.4th at p. 899 [noting *Clark's* statement of uncertainty].) In *People v. Martinez* (1996) 51 Cal.App.4th 537, this court acknowledged the high court had left the question unresolved, and considered whether the corpus delicti rule applied to uncharged bad acts introduced for impeachment purposes in the guilt phase of trial. Agreeing with the observations and analysis of the appellate court in *People v. Denis* (1990) 224 Cal.App.3d 563, we observed in *Martinez* that the defendant had relied only on dicta as the corpus delicti rule had never been applied to evidence of other prior crimes. (*Martinez*, 51 Cal.App.4th at pp. 544-545.) Further, we concluded it was reasonable that the corpus delicti rule did not apply when a prior uncharged offense was introduced only for impeachment: "There is no requirement that the proponent of a prior inconsistent statement prove the truth of the prior statement since it is inconsistency itself which makes the prior statement relevant and admissible evidence." (*Id*. at p. 546.)

Poizner maintains that regardless of whether the corpus delicti rule applies to evidence offered for impeachment or under section 1101, it should apply to propensity evidence admitted under section 1108, because such evidence has historically been

excluded as inherently prejudicial and provides a stronger basis for applying the rule than other evidence for impeachment or intent and motive. He asks us to find these circumstances akin to the introduction of unadjudicated crimes admitted in aggravation at the penalty phase of a capital trial, where the corpus delicti rule applies. (See *People v. Valencia* (2008) 43 Cal.4th 268, 296.)

We conclude the trial court did not err with respect to its admission of the James and Homeboy writings. Following *Clark*, the high court decided *People v. Alvarez*, where it addressed whether the corpus delicti rule was abrogated by the "Right to Truth–in–Evidence" amendment to the California Constitution providing that "relevant evidence shall not be excluded in any criminal proceeding." (Cal. Const., art. I, § 28, subd. (d).) (*Alvarez, supra*, 27 Cal.4th at p. 1165.) The Court concluded the constitutional provision changed the aspect of the corpus delicti rule regarding the admission of extrajudicial statements: "[I]nsofar as the corpus delicti rule restricts the admissibility of incriminatory extrajudicial statements by the accused, [article I,] section 28 [, subdivision] (d) abrogates it." (*Alvarez*, at p. 1174; see *People v. Valencia*, *supra*, 43 Cal.4th at p. 297.) The rule's independent proof requirement to support a conviction, however, remained undisturbed: section 28, subdivision (d) "*did not* abrogate the corpus delicti rule insofar as it provides that every *conviction* must be supported by some proof of the corpus delicti *aside from* or *in addition to* such statements, and that the jury must be so instructed." (*Alvarez*, 27 Cal.4th at p. 1165.)

Thus, "[a]s a result of the first determination in *Alvarez*, 'there no longer exists *a trial* objection to the *admission in evidence* of the defendant's out-of-court statements on

grounds that independent proof of the corpus delicti is lacking. If otherwise admissible, the defendant's extrajudicial utterances may be introduced in his or her trial without regard to whether the prosecution has already provided, or promises to provide, independent prima facie proof that a criminal act was committed.' [Citation.] However, as a result of the second determination, the jury must be instructed 'that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements'; also, the defendant may, on appeal, 'attack the sufficiency of the prosecution's independent showing.' " (*People v. Powers-Monachello* (2010) 189 Cal.App.4th 400, 407-408.)

Here, Poizner's writings, which reflected either nonconsensual sexual touching of James A. or sexual activity with a 17-year-old, were otherwise admissible under section 1108 as circumstantially relevant to the issue of his disposition or propensity to commit sex offenses. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012.) Accordingly, the corpus delicti rule no longer prevented admission of the writings into evidence. (See *People v. Valencia, supra*, 43 Cal.4th at p. 297.) Under *People v. Alvarez*, *supra*, 27 Cal.4th 1161, notwithstanding Proposition 8, the court must "instruct the jury that [the defendant's extrajudicial] statements cannot be the sole proof the crime occurred." (*Id*. at p. 1181.) The trial court so instructed the jury in this case. Not only was the jury correctly instructed with a proper corpus delicti instruction, but the court also appropriately instructed the jury that the uncharged offenses were not sufficient by themselves to prove beyond a reasonable doubt that Poizner committed the charged offenses. (*Reliford*, 29 Cal.4th at p. 1013.)

We otherwise decline to apply the corpus delicti rule in the context of prior uncharged offenses offered under section 1108 for purposes of inferring propensity. A trial court must instruct, sua sponte, on corpus delicti where a defendant's extrajudicial admission of guilt would otherwise qualify as substantial evidence to support a conviction. (See *People v. Najera* (2008) 43 Cal.4th 1132, 1137.) The circumstances presented here do not implicate the purpose of the rule, which is to require sufficient independent corroboration of the defendant's *confessions to crimes for which he is on trial*. "As one court explained, 'Today's judicial retention of the [corpus delicti] rule reflects the continued fear that confessions may be the result of either improper police activity or the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically.' [Citation.] [¶] Viewed with this in mind, the low threshold that must be met before a defendant's own statements can be admitted against him makes sense; so long as there is some indication that the charged crime actually happened, we are satisfied that the accused is not admitting to a crime that never occurred." (*People v. Jennings* (1991) 53 Cal.3d 334, 368.) Poizner was not charged with crimes against James A. and Homeboy, there was no danger he would be convicted of such crimes, and those uncharged offenses could not serve as substantial evidence to support Poizner's convictions. We hold the trial court was not required to instruct the jury that the prosecution was required to present independent proof of the acts described in Poizner's writings, which were admitted for the limited purpose of permitting the jury to infer Poizner's propensity to commit sex offenses.

Finally, even if error occurred, it would not warrant reversal of the judgment. We assess prejudice relating to the corpus delicti rule under the state law standard of *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 719, fn. 36 [assessing claim of corpus delicti error in penalty phase under state law standard].) "Error in omitting a corpus delicti instruction is considered harmless, and thus no basis for reversal, if there appears no reasonable probability the jury would have reached a result more favorable to the defendant had the instruction been given." (*People v. Alvarez, supra*, 27 Cal.4th at p. 1181.) Here, each victim testified in detail about the acts committed against him by Poizner, and the prosecution bolstered Austin's testimony with the pretext call with Poizner's incriminating statements. Further, despite hearing the evidence of Poizner's writings, the jury convicted him of lesser included offenses on two of the section 288 charges as to Brandon P. Thus, the verdicts themselves reveal that the evidence did not have an overly prejudicial impact. In sum, Poizner cannot show prejudice, even assuming error in the jury instructions.

II. *Consensual Spanking as Section 1108 Propensity Evidence*

Poizner contends the trial court denied him due process and a fair trial by admitting his writings describing the acts of spanking Homeboy, and then instructing the jury it could consider those acts as criminal sexual offenses so as to draw an inference of propensity to engage in sexual offenses. Poizner maintains the act of spanking Homeboy on his 18th birthday is not a qualifying offense under section 1108, and the error resulted in substantial prejudice in that he was "both wrongly branded a criminal based on the

Homeboy spanking acts, and the jury was permitted to conclude if he committed that 'offense' he committed the charged offenses . . . ."

The People concede the consensual spanking of Homeboy on his 18th birthday does not qualify as a sexual offense within the meaning of section 1108. Stating the trial court's instruction was unclear as to which acts of spanking qualified under section 1108, they agree the trial court erred to the extent it instructed the jury that those acts could be considered as propensity evidence. However, they point out the evidence of these acts was nevertheless admissible under section 1101 to prove intent, common plan or scheme, or any of the other permissible inferences under that statute, and maintain the instructional error was harmless because the evidence of Poizner's guilt—via the victims' testimony and Poizner's own admissions in his pretext call to Austin—was overwhelming. The People argue that there is no reasonable probability Poizner would have achieved a more favorable result absent the error.

We assess de novo whether jury instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) In reviewing a claim that the court's instructions were misleading, our inquiry is whether there is a reasonable likelihood the jury misunderstood and misapplied the instructions. (*People v. Mayfield* (1997) 14 Cal.4th 668, 777.) We consider the instructions as a whole, and we assume the jurors use intelligence and common sense when applying and correlating the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396.) In a noncapital case, instructional error is reviewed for prejudice under *People v. Watson*, *supra*, 46 Cal.2d 818. (See *People v. Gamache* (2010) 48 Cal.4th 347,

376; *People v. Breverman* (1998) 19 Cal.4th 142, 178.) Under that standard, the conviction may be reversed only if " 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*Breverman*, at p. 178.)

We agree the instructional error, if any, is harmless. Though the propensity instruction referred generally to Poizner's spanking of Homeboy as one of the uncharged sexual offenses without distinguishing Homeboy's age, directly afterwards the jury was separately instructed concerning Poizner's consensual sexual activity with Homeboy after his 18th birthday, and specifically told to exclude that evidence from its consideration of Poizner's propensity to commit sex offenses. Thus, at most, the jury instructions were arguably contradictory and potentially misleading. However, assessing the instructions as a whole as we must (*People v. Ramos*, *supra*, 163 Cal.App.4th at p. 1088), we conclude they were reasonably clear that Poizner's consensual sexual activity with Homeboy after he turned 18 years old was not relevant to Poizner's disposition or inclination to commit the charged crimes, and the instructions appropriately apprised the jury that that particular consensual activity was relevant to other issues such as specific intent, plan or scheme, and witness credibility.

Further, review under *Watson* " 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence

supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result . . . .' " (*People v. Moye* (2009) 47 Cal.4th 537, 556.) Poizner does not challenge the sufficiency of the evidence of his convictions, and the jury plainly accepted the victims' testimony as to Poizner's conduct. Additionally, as stated, Austin D.'s testimony was corroborated by the pretext call introduced into evidence. Other boys corroborated some of the conduct between Poizner and Brandon. Given the ample evidence supporting Poizner's convictions, and absent any indication the jury was confused or uncertain about Poizner's guilt, we conclude Poizner cannot demonstrate prejudice, even if he could establish error.

III. *Claim of Instructional Error Regarding Use of Charged Offenses As Evidence of Propensity*

Poizner contends the trial court prejudicially erred by instructing the jury that they could consider the charged crimes in deciding whether he had a propensity to commit other charged offenses. Urging us to follow *People v. Quintanilla* (2005) 132 Cal.App.4th 572 (*Quintanilla*), Poizner maintains section 1108 does not authorize the use of currently charged offenses to convict a defendant of other charged crimes, and to use such charged offenses in this manner "interferes with the trial court's right to exclude the propensity evidence under section 352, the linchpin which saves this statute from being violative of due process." Poizner argues that as a result, the instruction reduced the People's burden of proof, denied him his right to a jury trial, and violated his right to due process. He notes the issue at hand—whether jurors could consider charged offenses as

propensity evidence under section 1108—was on review in the California Supreme Court.

Following the completion of briefing in this matter, the high court in *People v. Villatoro* (2012) 54 Cal.4th 1152 resolved the question in the People's favor. In *Villatoro*, the court observed that section 1108 by its terms did not distinguish between charged or uncharged sexual offenses, but refers to " '*another* sexual offense or offenses.' " (*Id*. at p. 1160.) The court stated, "This definition of 'another' contains no limitation, temporal or otherwise, to suggest that section 1108 covers only offenses other than those for which the defendant is currently on trial." (*Id*. at p. 1161.) Nor did the statute's qualifying language concerning section 352 mandate that the sexual offense be uncharged. (*Ibid*.) Disapproving *Quintanilla* on that point, the court in *Villatoro* concluded that nothing in the language or legislative history restricted the application of section 1108 to uncharged offenses. (*Villatoro*, 54 Cal.4th at pp. 1163, fn. 5, 1164.)

The court in *Villatoro* proceeded to consider whether the trial court had erred by instructing the jury with a modified version of CALCRIM No. 1191 similar to the instruction given in the present case,[4] and the defendant's argument that the modified

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4 The modified instruction given in *Villatoro* provided: " 'The People presented evidence that the defendant committed the crime of rape as alleged in counts 2, 4, 7, 9, 12 and 15 and the crime of sodomy as alleged in count 14. These crimes are defined for you in the instructions for these crimes. [¶] If you decide that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes of rape or sodomy, and based on that decision also conclude that the defendant was likely to and did commit the other offenses of rape and sodomy charged. If you conclude that the defendant committed a charged offense, that conclusion is only one factor to consider

instruction failed to clearly designate the standard of proof that applied to the charged offenses. (*People v. Villatoro, supra*, 54 Cal.4th at p. 1167.) The defendant in *Villatoro* contended that a juror could have used any standard of proof, or none, to convict him, depriving him of the presumption of innocence. The court rejected these arguments, pointing out "the instruction clearly told the jury that all offenses must be proven beyond a reasonable doubt, even those used to draw an inference of propensity. Thus, there was no risk the jury would apply an impermissibly low standard of proof." (*Id.* at p. 1168.) It pointed out the trial court had also instructed the jury with CALCRIM No. 220, which "defines the reasonable doubt standard and reiterates that the defendant is presumed innocent; it also explains that only proof beyond a reasonable doubt will overcome that presumption." (*Ibid.*) Thus, the modified instruction did not impermissibly lower the standard of proof or otherwise interfere with defendant's presumption of innocence. (*Ibid.*)

Finally, the court rejected the defendant's argument that the trial court in that case had not undertaken a section 352 analysis before giving the modified instruction. (*People v. Villatoro, supra*, 54 Cal.4th at p. 1168.) It held the record reflected the trial court implicitly conducted such an analysis as it properly could, but that any error in its failure to do so was harmless in view of the striking similarity of the various prior offenses and

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along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge.' " (*People v. Villatoro, supra*, 54 Cal.4th at p. 1167 & fn. 7.)

their high probative value, which substantially outweighed any prejudice. (*Id*. at pp. 1168-1169.)

Villatoro disposes of Poizner's arguments as to the instruction's impact on the People's burden of proof, on which his due process and jury trial claims are based. Moreover, it is plain from the record here that the trial court, as in *Villatoro,* implicitly if not expressly made a section 352 analysis of the prior offenses before permitting them to be used as evidence under section 1108. In reviewing this particular jury instruction, the court stated in part: "The discussion was that 1108 only applies to other uncharged crimes and [*People v. Wilson* (2008) 166 Cal.App.4th 1034] talks about the fact that it applies as well to other charged crimes. The jury can appropriately use those as propensity evidence under 1108 when they're evaluating each of those crimes essentially if the crimes are cross-admissible, if they're relevant, if they're admissible under 1108, *and I believe that I've already made that determination when we first argued the case for consolidation, . . .* each [of the crimes] were similar enough regarding the age of the boys, the circumstances of the molests, the type of touching, that they would be cross-admissible." (Italics added.) The record reflects an adequate section 352 weighing process, not mere reliance on *People v. Wilson*, *supra*, 166 Cal.App.4th 1034, to admit the charged crimes as evidence.

IV. *Admission of Evidence of Poizner's Sexual Orientation and Possession of Pornographic Material*

Poizner contends the trial court violated his right to due process and a fair trial by admitting evidence that he had told Brandon's mother he was gay, as well as evidence he

possessed a pornographic DVD cover depicting graphic, sexually explicit acts (oral copulation) between youthful-looking adult men and containing a brief but prurient description on the back of the cover.[5] He argues neither his sexual orientation nor the DVD jacket were logically relevant to the crimes of lewd conduct with children, and they were not relevant under section 1101 to prove intent, common plan or scheme, or to evaluate witness credibility. Poizner maintains that to the extent the evidence had some degree of relevance, the court abused its discretion by failing to exclude it as unduly prejudicial under section 352. According to Poizner, these errors, combined with the court's instruction to the jury that it could consider this evidence to determine his intent, plan or scheme to commit the offenses or evaluate witness credibility, requires reversal.

A. *Evidentiary Principles*

Section 350 states: "No evidence is admissible except relevant evidence." Relevant evidence is "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) Although " 'there is no universal test of relevancy, the general rule in criminal cases [is] whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution[.]' " (*People v. Freeman* (1994) 8 Cal.4th

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[5] Counsel read the summary to the court, reminding it the DVD cover was going to be with the jury during deliberations: "I'm just reading the back of this. This is going back to the jury—'an incredible 18-year-old's sexual twinkfest.' It says, 'Kenny Rose and David Fire are also lean hairless lads who are horny and insatiable. The uninhibited sex from these big dick teens has to be seen to be believed. Great cock-sucking, rimming and fucking produce volumes, loads, of thick teen spunk and explode everywhere.' " The text appears on the upper left hand corner of the back of the DVD cover in 18-character-per-inch type.

450, 491.) Such material facts include identity, intent or motive. (*People v. Bivert* (2011) 52 Cal.4th 96, 116.) The trial court however, has discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (§ 352.) Prejudice in this respect means " 'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.' " (*People v. Heard* (2003) 31 Cal.4th 946, 976.) The prejudice that section 352 is designed to avoid " 'is . . . "prejudging" a person or cause on the basis of extraneous factors.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

"Trial courts enjoy ' "broad discretion" ' in deciding whether the probability of a substantial danger of prejudice substantially outweighs probative value. [Citations.] A trial court's exercise of discretion 'will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Holford* (2012) 203 Cal.App.4th 155, 167-168.)

"In general, 'evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.' [Citation.] Such evidence is admissible, however, 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a

prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.' " (*People v. Page* (2008) 44 Cal.4th 1, 40, quoting § 1101, subds. (a), (b).)

B. *Evidence of Poizner's Sexual Orientation*

Before trial, Poizner moved in limine to exclude evidence of his sexual orientation, specifically evidence that he had told the boys or a parent he was gay or bisexual. The prosecutor argued the evidence was relevant to Poizner's intent, sexual interest and motivation to be around the boys, and also because he had used that fact about himself to gain the parents' trust. Though the trial court observed there was potential prejudice, it found there was substantial relevance to the evidence that Poizner had a sexual interest in people of the same sex, and was also part of Poizner's grooming behavior. In part, it reasoned, "I totally agree with the label of being homosexual is potentially prejudicial. And as I said, in the vast majority of cases, I think, would have absolutely no relevance. I also think that there is a potential for jurors to equate homosexuality with pedophilia and that's—I mean, I would be happy to allow you to put on an expert to say that that's absolutely not true. But I also see the potential prejudice. There is no question. I also see a very substantial relevance. I mean, talk to anybody on the street and you ask them if they think it's relevant, and if a man is accused of molesting boys, whether or not he's homosexual or heterosexual, they will tell you, yes, it's relevant."

Accordingly, at trial, Austin testified that on one occasion after Poizner took him home, Poizner sat down and introduced himself to Austin's mother, telling her, " 'I don't want you to hear from anybody else, but I'm gay, but I'm into stable, steady relationships. And I'm not into, like, the teenagers or the boys, or anything.' "

There is no question that evidence of a defendant's sexual preference can be highly prejudicial if it is irrelevant to the charged crime. (*U.S. v. Yazzie* (9th Cir. 1995) 59 F.3d 807, 813; see *U.S. v. Gillespie* (9th Cir. 1988) 852 F.2d 475, 478-479 [holding evidence of homosexuality is extremely prejudicial and trial court erred in admitting evidence of defendant's homosexual relationship as it neither proved nor disproved that the appellant committed child molestation; reversing conviction for transportation of a person in interstate commerce for illegal sexual purposes]; *Cohn v. Papke* (9th Cir. 1981) 655 F.2d 191, 194 [possibility of prejudicial effect of evidence of homosexuality is great since jury may be influenced by biases and stereotypes; evidence of prior homosexual experiences of plaintiff in civil rights case against police had minimal probative value regarding whether he solicited act of prostitution]; *U.S. v. Birrell* (9th Cir. 1970) 421 F.2d 665, 666 [reversing a conviction for interstate transportation of a stolen motor vehicle due to the prosecutor's statements urging the jury to convict the defendant and not "turn him loose on society" because he was homosexual]; *State v. Bates* (1993) 507 N.W.2d 847, 850, 852 [evidence of defendant's sexual orientation was improper character evidence; whether the defendant was sexually attracted to adult men was irrelevant to whether he was sexually interested in his 8 and 12-year-old victims].) The Ohio Supreme Court has said: "[T]he modern understanding of pedophilia is that it exists wholly independently

from homosexuality. The existence or absence of one neither establishes nor disproves the other. 'The belief that homosexuals are attracted to prepubescent children is a baseless stereotype.' . . . Thus, evidence of homosexuality is not relevant to establish pedophilia." (*State v. Crotts* (Ohio 2004) 820 N.E.2d 302, 306.) However, exclusion is required only where the evidence's unfair prejudice *substantially outweighs* its probative value. (§ 352; *U.S. v. Yazzie*, 59 F.3d at pp. 811-812.)

We perceive no manifest abuse of discretion in the trial court's admission of this evidence. In this case, Poizner's homosexuality was not collateral to the issues. Poizner's remark to Austin's mother about his sexual preference and assurance he was not attracted to teenagers or boys was part of Austin's trial testimony, and it tended to show Poizner's plan or scheme to reassure parents and gain access to the boys while concealing his true intentions. This is a permissible use of such evidence, no matter how the evidence may reflect on the defendant. (§ 1101, subd. (b); *People v. Mullen* (1953) 115 Cal.App.2d 340, 342-343 [evidence of homosexual tendencies of the male defendant was relevant to charge of assault, where prosecution's theory at trial was that the male victim of the assault was interfering with the defendant's relationship with another man]; *People v. Helwinkel* (1962) 199 Cal.App.2d 207, 214 [citing *Mullen* for proposition that evidence of homosexual tendencies of the defendant was relevant to show motive].)

We need not analyze further whether the court's section 352 ruling on this point was an abuse of discretion, because even assuming error, under the circumstances, the introduction of this evidence was harmless. The prosecutor did not use the evidence of Poizner's homosexuality in a repeated or inflammatory way. At one point in closing

arguments, she referred briefly to Poizner's homosexuality in telling the jurors—appropriately—they could consider that and other circumstances to decide whether Poizner's touchings were sexually motivated.[6] At another point she recounted the testimony of Poizner's female roommate, who said Poizner had heterosexual pornography and she thought it "a little odd because he's gay." At no point did the prosecutor make remarks suggesting that Poizner's sexual preference disposed him to a sexual desire for adolescent boys. Indeed, as we have set out above, the trial court gave a curative instruction to the jury that it was not to consider Poizner's sexual preference on the question of his disposition or inclination to commit the charged offenses. We presume the jurors followed that instruction absent any contrary indication. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) And the trial evidence concerning Poizner's sexual preference was no more inflammatory than the evidence from the victims of the lewd touchings.

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6 In part, the prosecutor argued, "The Court has told you the instructions and what you can do and what you must consider, and we'll go into that in a little bit in more detail. But, basically, you're going to have to use both direct and circumstantial evidence to find the elements of the crime, particularly child molest. And we'll get to that in a new seconds. [¶] But looking at the totality of the evidence, the direct evidence of the children, the circumstantial evidence is including things such as the defendant's methodology of when he's touching them for sexual motivation. You're going to have to make that determine [*sic*] of whether or not when he's touching them whether it was sexually motivated. And to that, you can look at all the circumstances. You can look at the fact that he likes pornography. He is a homosexual and enjoys pornography. He has pornography that depicts men as minors. It describes them as being very young, youthful. It's obvious he enjoys being around young boys. He had volunteered to take on a position where he's not paid, and he's constantly around young boys without anybody to monitor him. He has made his life around these boys."

Further, as we have already observed, the evidence against Poizner is abundant and strong. He has not challenged the sufficiency of the evidence of his convictions, and the victims testified directly, specifically and unequivocally about the offenses. None of their testimony was physically impossible or inherently lacking in credibility, and Austin's was corroborated by Poizner's own incriminating admissions. The victims' testimony, believed by the jury, was sufficient to exclude any chance that the admission of the evidence contributed to Poizner's convictions. Accordingly, under the state law *Watson* standard of error in admitting evidence we cannot say it is reasonably probable the verdict would have been more favorable to Poizner absent any assumed error. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Nor can we say federal due process was offended. Given the limited use of the evidence and brief trial references to it, admission of the evidence did not render the trial fundamentally unfair. (*Ibid.*)

C. *The DVD Cover*

As for its decision to admit the DVD cover found in Poizner's possession, the trial court reasoned in part: "I do recognize that there is some prejudice to seeing the pictures. They're not particularly pleasant pictures. [¶] But there's no question that the defense in this case has been to challenge the credibility of each of these boys, that they're making this up for all sorts of various reasons, to even challenge the credibility of Mr. [A.], and that if the defendant's a homosexual, he's a homosexual and interested in adults, not children, and this video, his possession of it, appears to support an inference that he does have a sexual interest in young-looking men. They may be adult men, but they look like teenage boys. [¶] How they look—I don't particularly like the idea of the jury's seeing

the sex acts, but looking at the age of the boys in this video or on the cover of the video is unfortunately very probative."

Poizner acknowledges that in *People v. Page*, *supra*, 44 Cal.4th 1, the California Supreme Court reaffirmed the potential relevance of evidence of a defendant's possession of sexual images on the issue of intent. It explained: "In *People v. Memro* (1995) 11 Cal.4th 786 . . . (*Memro*) [abrogated on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 639, fn. 18], the defendant was charged with first degree felony murder based upon a violation of [Penal Code] section 288, which prohibits the commission of a lewd and lascivious act upon a child who is under the age of 14 years. The defendant in *Memro* enjoyed taking photographs of young boys in the nude, and he had escorted his victim, seven years of age, to the defendant's apartment with the intent of taking photographs of the victim in the nude. When the victim said he wanted to leave, the defendant strangled him and attempted to sodomize his dead body. The trial court admitted magazines and photographs possessed by the defendant containing sexually explicit stories, photographs, and drawings of males ranging in age from prepubescent to young adult. We concluded the trial court did not abuse its discretion, because 'the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction. [Citation.] The photographs of young boys were admissible as probative of defendant's intent to do a lewd or lascivious act with [the victim].' " (*People v. Page*, 44 Cal.4th at p. 40.)

Poizner apparently seeks to distinguish *Page* and *Memro*, arguing the DVD here is "wholly and utterly irrelevant" under any theory because there is no connection between the DVD jacket reflecting actions between adults and the charged crimes, and because none of the victims were shown the DVD. We disagree. The question is whether the images of young males orally copulating each other permitted the jury to draw an inference of Poizner's sexual interest in young boys or engage in touchings with lewd intent in violation of Penal Code section 288. Though the DVD jacket may actually have depicted adult males on the cover, their appearance is easily that of adolescent boys, and thus it is probative on the question of Poizner's sexual motivation in his contact with the young victims. Importantly, "[t]he least degree of similarity (between the uncharged act and the charged offense) is required" to prove the defendant's mental state, such as his intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

And while the DVD cover is prurient, graphic and portrays sexually explicit conduct beyond what occurred in the present case, we cannot say it is unduly prejudicial. Prejudicial evidence, as referred to in section 352, is that which " ' "tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " ' " (*People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1098, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 320.) It is "not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) In *Memro*, the defendant argued that sexually graphic magazines and pictures of young boys was barred by section 352. (*People v. Memro, supra*, 11 Cal.4th at p. 864.)

But the court found no abuse of discretion, stating, "To be sure, some of this material showed young boys in sexually graphic poses [and] [i]t would undoubtedly be disturbing to most people. But we cannot say that it was substantially more prejudicial than probative, for its value in establishing defendant's intent to violate [Penal Code] section 288 was substantial." (*Ibid*.) Here, Poizner's conduct at times went beyond mere hugs and massages, he rubbed Austin's genitals and offered to orally copulate him twice, which is the sort of activity reflected on the DVD cover.

Thus, though the DVD cover was capable of engendering antipathy towards Poizner, this did not substantially outweigh its probative value, both as to Poizner's lewd intent and to the victims' credibility, which was the central theme of Poizner's defense.[7] Poizner sought to characterize his conduct as innocent, and thus evidence tending to show his touchings were done with the requisite lewd intent, even though the acts themselves may not have been lewd, was highly relevant. (See *People v. Martinez* (1995) 11 Cal.4th

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7 For example, in closing argument, Poizner's counsel recounted that Austin had admitted fabricating an incident with his mother's boyfriend, and then said, "So the reality of the situation is he knew what he was doing either from the witness stand or at the time he was making the allegations. And those are false allegations. See, kids make things up to get attention. These are young, troubled individuals. They're not the teens that—you know, they're not the top of their class. They're not from the families that are nurturing. These kids have problems. That's the reason they're in the program in the first place. [¶] Same thing with Brandon. Brandon also made allegations, false allegations against his own father. Why? Because he wanted to get his father in trouble. If he had it his way, he'd try to get his dad arrested. He told you that. He said, 'I wanted him out. I wanted him to get in trouble' for false allegations. [¶] So the kids are not beyond making allegations which are false, because they've done it in the past. Further, defense counsel described Poizner's conduct with Brandon as "flicking" or "playful backhanding" in his groin area, ascribing innocent intent to that conduct, and even characterizing their interactions as "normal conduct . . . ."

434, 444 [Penal Code section 288 "prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act"].) In sum, the trial court did not manifestly abuse its discretion in finding probative value to the DVD cover, and concluding its probative value was not outweighed by its prejudicial impact.

V. *Cumulative Error*

Poizner contends the cumulative impact of the trial court's errors requires reversal of his convictions. Our rejection of his claims of substantive error, and conclusion that any assumed error was harmless, necessarily disposes of his claim of cumulative error. (*People v. Boyer* (2006) 38 Cal.4th 412, 475; *People v. Garcia* (2008) 168 Cal.App.4th 261, 295, fn. 18.)

VI. *Amendment of Abstract of Judgment*

We observe that the abstract of judgment in this case reflects that Poizner was convicted in counts 18 and 25 of violations of Penal Code section 136.1, subdivision (a)(2). Poizner, however was charged with violations of subdivision (b)(1) of that statute, and the jury was instructed on and returned verdicts indicating his conviction was for violations of Penal Code section 136.1, subdivision (b)(1). In view of the jury's findings, the abstract of judgment should reflect that Poizner was convicted in counts 18 and 25 of violations of section 136.1, subdivision (b)(1). (*People v. Smith* (2001) 24 Cal.4th 849, 854 [appellate court may correct obvious and easily fixable errors even in absence of objection at sentencing].) We so modify the judgment and direct the trial court to amend the abstract of judgment accordingly.

DISPOSITION

The judgment is modified to reflect that Poizner was convicted in counts 18 and 25 of violations of Penal Code section 136.1, subdivision (b)(1). The trial court is directed to amend the abstract of judgment to reflect this modification and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.